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Supreme Court, U.S.
FILED
OCT 28 1993
OF THE CLERK

No. 93-616

In The

Supreme Court of the United States

October Term, 1993

THE UNITED KEETOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA,

Petitioner,

v.

THE OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS WHY THE PETITION SHOULD BE DENIED.

The United Keetowah Band of Cherokee Indians in Oklahoma ("UKB" hereafter) argues that the opinion of the Tenth Circuit Court of Appeals in

this case is in conflict with the decisions of this Court in *Oklahoma Tax Commission v. Sac and Fox Nation*, ____ U.S. ____, May 17, 1993, Case No. 92-259, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), and *United States v. Sandoval*, 231 U.S. 28 (1913).

The Tenth Circuit opinion is not in conflict with these decisions and this case is so fact specific as to be an undesirable case for review by this Court. The situation of the UKB is outlined in the lower court opinions attached as Appendix A and B to the petition for certiorari.

Basically, the UKB was recognized as an Indian tribe by the federal government in 1946. Historically, the Bureau of Indian Affairs has recognized the Cherokee Nation as the primary Cherokee tribe and the principal representative of the Cherokee people. Both of these tribes are located within the historical area (former reservation) of the Cherokee Nation in Oklahoma. The UKB has never inhabited a reservation nor have they been awarded any land as Indian Country by the federal government. The Indian Country which does exist in the Cherokee area in Oklahoma is held in trust by the United States for the Cherokee Nation and not the UKB.

The UKB has acquired several tracts of land in Oklahoma in fee simple absolute and has applied to the Bureau of Indian Affairs ("BIA" hereafter) to

transfer these lands into trust. The BIA's decision to accept these lands into trust is entirely discretionary under 25 CFR § 151.1 et seq. and the BIA has refused to acquire the UKB's land in trust without the consent of the Cherokee Nation, which will not give that consent, see District Court's Amended Order, footnote 8 at page 30a in App. B pet. cert. This case has more to do with a political struggle between two Indian tribes than it does with paying cigarette excise taxes to the Oklahoma Tax Commission. This Court would be well advised to deny cert. in this case, if for no other reason than to avoid becoming entangled in local tribal political questions of which this Court is not a proper forum for resolution.

The Tenth Circuit has determined that the fee simple tracts of land held by the UKB have not been set apart by the federal government for tribal use and the federal government has not agreed to maintain any superintendence over the land. The UKB's self-imposed restrictions against alienation do not rise to the level of government supervision. This ruling is consistent with *Sac and Fox* and *Potawatomi* dealing with Indian Country in Oklahoma. The *Sandoval* case is not inconsistent with the Tenth Circuit ruling, however, the extremely unique facts of *Sandoval* make it distinguishable from the facts of this case and for all purposes unhelpful to this inquiry.

The main thrust of the UKB's argument is that pursuant to 25 U.S.C. § 177, the UKB must obtain consent of the federal government before the

UKB can alienate any of the land it has purchased in fee simple. The Commission contends that this argument does not follow the rules governing the federal government's acquisition policies for trust lands held for Indian tribes. To follow the UKB's argument would be to eviscerate the federal government's power to acquire trust land.

Land acquisitions in trust are governed by federal regulations in 25 CFR § 151. Section 151.10 sets forth seven factors to be considered by the Secretary of the Interior in evaluating requests for acquisitions of land in trust status. If the UKB can create trust land simply by acquiring land in fee simple, the Department of the Interior would not have the power to deny trust status if its consideration of those factors so counseled, see District Court Order page 27a-28a pet. cert. Therefore, the UKB's argument that Section 177 provides trust status for its fee simple land title is not legally correct.

CONCLUSION

This case is not appropriate for Supreme Court review because the opinion of the Tenth Circuit is not in conflict with opinions of this Court and because the unique facts of this case which exclusively involve only two tribes in the Eastern part of Oklahoma are so narrow in scope as to counsel against granting cert.

The Tenth Circuit correctly decided this case in light of the applicable statutes and case law.

DATED this _____ day of October, 1993.

Respectfully submitted,

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